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No. 77-1085

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN BILTRITE, INC., ET AL., PETITIONERS

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In October 1973 the Louisville and Nashville Railroad Co. filed an application with the Interstate Commerce Commission for a certificate of public convenience and necessity that would permit abandonment of approximately 50.5 miles of rail line in Tennessee. The application was opposed by petitioners and other parties (see Pet. App. 15).[1] After a hearing the Commission,

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[1]We are uncertain whether the petition for a writ of certiorari, which identifies seven parties as petitioners, is filed on behalf of each of those parties or only on behalf of American Biltrite, Inc. (see Pet. 1). To the extent that the other parties are petitioners, their petition is untimely. The judgment of the court of appeals was entered on June 27, 1977, and a petition for rehearing was denied on July 25, 1977 (Pet. App. 11). On October 12, 1977, Mr. Justice Stewart extended American Biltrite's time for filing a petition for a writ of certiorari to and including December 22, 1977. No other party was granted an extension of time, and the time within which to file a petition therefore expired on October 23, 1977. See 28 U.S.C. 2101(c).

adopting the findings and conclusions of an administrative law judge, found that the proposed abandonment was consistent with the public convenience and necessity; it ordered that, subject to certain conditions, an appropriate certificate of abandonment should be issued (Pet. App. 13, 32-34).

The court of appeals affirmed (Pet. App. 9-10). It concluded that the "Commission's decision to grant the abandonment application is rational and supported by substantial evidence" (Pet. App. 10). In October 1977, after the court of appeals denied a petition for rehearing (Pet. App. 11), the Commission issued a certificate of abandonment to the Louisville and Nashville Railroad.

The decision of the court of appeals is correct, and further review is not warranted.

Petitioners argue that the Commission "apparently" (Pet. 7) failed to impose on the applicant the burden of proving that abandonment was consistent with the public convenience and necessity. Nothing in the Commission's order supports petitioners' contention that the burden of proof was allocated improperly. Although the Commission quite naturally "weigh[ed] the arguments advanced pro and con" (Pet. App. 28), it correctly stated that "no abandonment shall occur unless and until the Commission [determines] * * * that the present or future public convenience and necessity permit [it]" (*ibid.*). See *Colorado* v. *United States*, 271 U.S. 153, 168. The Commission's analysis of the parties' competing contentions reflects a recognition that the burden of proof was

on the applicant (Pet. App. 28-32); the Commission simply found that the applicant had made a convincing case.[2]

Petitioners also challenge the reliability of the railroad's financial data, which the Commission considered in finding that the line was not profitable (Pet. 7-8). The court of appeals correctly concluded, however, that the Commission's findings are "supported by substantial evidence" (Pet. App. 10), and petitioners have not shown that the court "misapprehended or grossly misapplied" that standard of review. *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283, 330; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[3] The Commission thoroughly discussed the financial data (Pet. App. 16-18, 28-30), and the courts may not reweigh the evidence. *Ralston Purina Co.* v. *Louisville & Nashville R. R.*, 426 U.S. 476.

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[2] Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 127, adding 49 U.S.C. (1976 ed.) 1a(1) *et seq.*, does not affect the allocation of burdens. Ex parte No. 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of Service* (Report of the Commission on Reconsideration, May 3, 1977, p. 21). The burden always has been on the applicant for abandonment, and the new statute simply codifies the Commission's practice. The statute's significance lies in the new provision allowing any responsible person or governmental entity to purchase or financially support the line, thus preserving it. See 49 U.S.C. (1976 ed.) 1a(6)(a), (7); H.R. Conf. Rep. No. 94-768, 94th Cong., 1st Sess. 180-181 (1975). The Commission discussed these new provisions and allowed eligible parties to take advantage of them (Pet. App. 13, 30-34).

[3] Petitioners' suggestion that the Commission relied solely on "the failure of profitable operation" (Pet. 8) in determining that abandonment was justified is groundless. The Commission also considered the physical condition of the line, the possibility of reducing losses by altering service, the present and future needs of shippers, and the effect of abandonment on industrial development and on labor (Pet. App. 28-32).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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